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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THE NATIONAL BANK OF COMMERCE, a Corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 2458

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Plaintiff in Error

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

During the years 1907, 1908 and 1909 M. P. McCoy, was an Examiner of Surveys and Special Disbursing Agent for the United States with headquarters at Seattle. His duties required him to

go into the field in the States of Washington, Oregon, Idaho and Montana and examine public land surveys made by the Government, by running over about one-tenth of the lines run by surveyors in making the surveys to check up the work of the Government engineers.

The National Bank of Commerce of Seattle was the Government depositary. The United States deposited with The National Bank of Commerce large sums of money at various times during the years named to the credit of M. P. McCoy, Examiner of Surveys and Special Disbursing Agent. McCoy was directed by a letter from the Treasury Department to leave his signature with the National Bank of Commerce; to draw checks upon that bank, and to sign the checks "M. P. McCoy, Examiner of Surveys and Special Disbursing Agent." This letter of instructions was shown by McCoy to the bank, and it contained no limitations upon his right to check against the account. His authority under the letter of instructions to draw the money upon his order was unlimited. (Record, pp. 82-83.)

Between October, 1907, and August 31st, 1909, upon checks so drawn, the bank paid out $15,129.81.

The checks in question were drawn by McCoy to fictitious payees, known by him to be fictitious at the time the checks were drawn. He endorsed the names of the fictitious payees upon the checks and cause them, so endorsed, to be deposited in another bank and the proceeds placed to his credit under another fictitious name. The names he used in opening up accounts in other banks were F. M. Clark and J. D. King. (Record, p. 65.)

McCoy made weekly returns to the Government and monthly quarterly rendered vouchers for all of his expenditures. The bank every month rendered a statement to the Government and to McCoy as to the condition of the account, and quarterly returned to the Government all the vouchers it has paid upon McCoy's order. The Government was thus advised monthly and quarterly by the bank as to the status of the account and was given the names of the persons to whom the checks were drawn and paid, and the reports of McCoy, also made quarterly, gave in detail the expenditures and the purposes for which the expenditures were made.

All of the payees were fictitious and McCoy, the agent of the Government, systematically during all of the time above mentioned, attempted to de-

fraud the Government and was unfaithful to his trust. He was arrested in September, 1909, charged with embezzling $5,718, the property of the United States (Record, p. 119). He was convicted and sentenced to the penitentiary; was paroled, and his is practically the sole testimony upon which the Government relies. The evidence shows that he had never been pardoned, nor had his civil rights been restored to him. The $5,718 mentioned in the indictment is alleged by the Government to have been "then and there the property of the United States, and this sum as a part of the sum of $15,129.81 for the recovery of which this action is prosecuted."

By indicting and convicting McCoy of embezzling these funds, described as the property of the United States, it necessarily follows that the Government ratified McCoy's action in drawing the money out of the bank in the manner he did. If McCoy did not embezzle the funds of the United States, then he was improperly convicted by the Government. If he was properly convicted by the Government then the Government ratified his action in drawing the checks and cannot in this proceeding be heard to contend that McCoy never

drew the money from the bank and that the bank still owes it to the Government.

During the time that McCoy was in the service of the Government, as before stated, he was required to give a bond to the United States conditioned upon his accounting to the Government for all moneys and property that came into his hands, and he did give such bond with the United States Fidelity & Guaranty Company as surety in the sum of $3,000, and after his defalcations the Government collected the full face of the bond on January 28th, 1910, and instead of crediting the same upon the money McCoy had drawn out of the bank upon the fraudulent checks made payable to fictitious payees, the Government charged back to McCoy the sum of $3,000 that had been paid out by the Government on account of salary, and then applied on the salary the $3,000 collected from the Surety Company. (Record, pp. 178-193). This the defendant did not discover until after the trial. But the whole matter was brought into the case upon the motion for a new trial. No credit was given to the bank either for the amount of $5,718 mentioned in the indictment or for the $3,000 collected from the Surety Company.

During the period that the checks in question were drawn McCoy had honestly performed certain work for the Government in the examination of surveys and had expended honestly for the Government from $1,000 to $4,000 (Record, pp. 63, 78, 79, 81), and the expenditures in this amount were paid from the money McCoy fraudulently had in his possession. All the checks drawn upon the defendant bank bore the genuine signature of McCoy in whose name the deposit was made.

The Government failed to make any investigation or inquiry as to the accounts of its agent from 1907, when the frauds commenced, until August, 1909; failed to ascertain, as it could easily have done, that McCoy was acting fraudulently, and that he was not doing the work nor expending the money that he represented he was doing, when a slight inquiry would have disclosed the fact and prevented its continuance, and would have prevented the loss that has been sustained by some one through the negligence of the Government and through the fraud of its agent. The plaintiff not only failed to discover the forgeries or notify the bank of any irregularity in the accounts, but failed to make any demand for the money until six months after

the forgeries were discovered. The failure of the Government to examine the returns made by the bank and to report errors in time was the cause of the successful practice or continuance of the frauds, and was necessarily detrimental to the defendant. The injuy could not have occurred had the Government performed its duty and examined the returns and verified their truthfulness.

In the amended answer to the complaint the defendant, after denying and admitting certain allegations thereof, interposed three defenses as follows:

"1. That the deposits so made by the plaintiff with the defendant in favor of M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor, and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by the said McCoy against said deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said McCoy, as Examiner of Surveys

and Special Disbursing Agent, and that monthly statements were rendered to plaintiff and to the said McCoy showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any checks by reason of forgeries, fictitious payees, or otherwise until the 5th day of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of said McCoy and upon the rendition of statements of his account to have examined said account and to have promptly notified the defendant of the alleged forgeries or fraud, if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries or fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, in that the defendant would have been able—if the forgeries had been promptly made known to the defendant—to have prevented any of the forgeries except the first one, or the ones that occurred during the first month of the period during which said forgeries are alleged to have been committed; and that by reason of the failure of the plaintiff to so promptly notify the defendant of the fraud of the said McCoy the defendant is precluded from asserting any claim that it may have had against the various banks which forwarded the checks in question to the defendant for payment, and that by reason of the plaintiff's

failure to so notify the defendant of such fraud on the part of said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers, was sent by the defendant to the plaintiff, the said plaintiff is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

2. That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy as Examiner of Surveys, was authorized to make and pay on behalf of the United States.

3. That subsequent to the issuance of the checks described in the complaint and their payment by the defendant, the plaintiff, with full knowledge of the facts, ratified and approved the action of M. P. McCoy in drawing such checks in the way in which they were drawn, and the action of the defendant in paying them and charging the amounts thereof to the account of the plaintiff, carried on the books of the defendant in the name of M. P. McCoy as Examiner of Surveys and Special Disbursing Agent."

The third affirmative defense was interposed at the trial by permission of the Court but in the printed record the third defense of ratification does not seem to have been included. However, there can be no question of the defense having been made. Reference to it is specifically set forth on pages 150 and

175 of the record. The plaintiff in its reply denied the allegations of the third affirmative defense hereinbefore set forth. After the introduction of the testimony the Court, upon the motion of the plaintiff instructed the jury to bring in a verdict for the full amount prayed for in the complaint and refused to submit to the jury any question whatsoever, and refused to submit to the jury, under proper instructions, particularly the questions:

First: The defense set up by the defendant that $4,000 of the money withdrawn from the bank was actually honestly used by McCoy in payment of the legitimate expenses connected with the examination of surveys, which expenses McCoy had the right to incur and pay.

Second: As to the defense made by the defendant that the Government had been paid $3,000 by McCoy's surety, and had failed to credit the defendant with this sum.

Third: As to the defense that the Government had ratified McCoy's action in withdrawing from the defendant bank the sum of $5,718, which the Government alleged in the indictment against McCoy was the money of the United States.

The defendant also pleaded in its amended

answer the statute of the State of Washington which provides that when a bank renders a statement of account to a depositor such depositor must, within sixty days notify the bank of any error or forgery, and if the depositor fails to so notify the bank within such time, no suit can be prosecuted. The demurrer to this defense was sustained.

ASSIGNMENTS OF ERROR.

I.

The Court erred in granting plaintiff's motion for a directed verdict. (Record, p. 154.)

II.

The Court erred in receiving and filing such verdict. (Record, p. 154.)

III.

The Court erred in entering final judgment in favor of the plaintiff. (Record, p. 31.)

IV.

The Court erred in refusing to submit the case to the jury for its determination.

V.

The Court erred in refusing to submit the case to the jury and to give defendant's first requested instruction. (Record, p. 201.)

VI.

The Court erred in refusing to give defendant's fifth requested instruction. (Record, p. 202.)

VII.

The Court erred in refusing to give defendant's sixth requested instruction. (Record, p. 203.)

VIII.

The Court erred in refusing to give defendant's seventh requested instruction. (Record, p. 204.)

IX.

The Court erred in refusing to give defendant's eighth requested instruction. (Record, p. 204.)

X.

The Court erred in refusing to permit the defendant to introduce in evidence defendant's offered Exhibit No. 1, which exhibit contained a transcript of the various statements furnished by the defendant at monthly intervals during the period the checks described in the complaint were issued by McCoy and paid by the defendant bank, and showed the condition of the account of McCoy with defendant's bank. (Record, p. 205.)

XI.

The Court erred in refusing to permit the witness Walker to testify as to the course of dealing between the bank and the Government with reference to this account and to show the ratification of the action of the bank in paying McCoy's checks. (Record, p. 205.)

XII.

The Court erred in refusing to permit defendant to introduce evidence in support of its second affirmative defense. (Record, p. 206.)

XIII.

The Court erred in sustaining the demurrer of the plaintiff to the first affirmative defense set forth in defendant's original answer. (Record, p. 206.)

XIV.

The Court erred in refusing to permit defendant to introduce evidence in support of its first affirmative defense, set forth in its amended answer. (Record, p. 206.)

XV.

The Court erred in denying defendant's motion for a new trial. (Record, p. 206.)

The grounds upon which the motion for a new trial was based were:

First: Errors in law occurring at the trial of said cause, and then and there excepted to by the defendant, which error consisted in granting the motion of the plaintiff for a directed verdict against the defendant at the conclusion of the introduction of the testimony and in refusing to vacate and set aside the verdict of the jury rendered in favor of the plaintiff and against the defendant for the sum of $15,129.81, with interest at the rate of 6 per cent per annum from the 5th of March, 1910. (Record, p. 171.)

Second: Newly discovered evidence, material to the defendant and which the defendant could not with reasonable diligence have discovered and produced at the trial. (Record, p. 171.)

The motion for a new trial was based upon the affidavits of E. S. McCord (Record, pp. 172, 176, 178, 180); J. A. Swalwell, (Record, p. 177); Richard D. Lang (Record, p. 187); and Abner H. Ferguson (Record, p. 189.)

ARGUMENT.

The various questions presented by this record can, we think, be best grouped and discussed under

the sub-divisions and propositions hereinafter stated.

I.

The motion for a directed verdict should not have been granted by the Court.

The second affirmative defense in the amended answer alleges as follows:

"That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy, as Examiner of Surveys was authorized to make and pay on behalf of the United States."

There was ample evidence, uncontradicted, to support this defense. This Court will bear in mind that the case of the Government rested solely upon the testimony of M. P. McCoy, the unfaithful agent of the United States. He testified that it was his duty to run about ten per cent of all the lines shown in the Government surveys; that he did not perform this duty in accordance with his instructions in all cases, but that he did perform a considerable amount of work that was within the line of the performance of his work, and did expend considerable sums of money in performing this work, and that the money

he expended was a part of the money that was deposited to his credit in the defendant bank and which he was authorized to use for such purpose, and that he did use a portion of this money for such legitimate purpose, and while his testimony is somewhat unsatisfactory, still it is perfectly apparent that he did legitimately expend from $1,000 to $4,000 for the benefit of the Government. (Record, pp. 56, 57, 59, 63, 78, 79, 80, 81.)

On page 81 of the record he testified as follows:

"Q. You think four thousand is the maximum?

A. Yes, sir.

Q. Would you consider that approximately the sum?

A. I should say a couple of thousand. It might have been more, it might have been less.

Q. It might have been as much as four thousand?

A. It might have been over two thousand."

Whether it was one thousand, two thousand, or four thousand is immaterial so far as the action of the Court in taking the case from the jury is concerned. From an examination of the testimony there can be no question but that from $2,000 to $4,000 was expended by McCoy in paying for labor

and material used in running the lines of the Government surveys. He had the right to incur indebtedness for subsistence and labor in connection with these surveys. He had the right to expend the moneys of the Government for that purpose, and he was authorized to use the money deposited by the Government in the defendant bank for that purpose. He did, according to the uncontradicted testimony, expend such money for such legitimate purposes, and it was manifestly the duty of the Court to submit the case to the jury to determine to what extent, by reason of such proper expenditure the Government has failed to make out its case for the full amount sued for. The defendant was entitled to have credited upon the claim against it the amount of the fund that did go into lawful channels in accordance with the instructions of the Government and in the performance of the duties imposed upon McCoy by the Government. It makes no difference whether the amount was $1,000, $2,000, $4,000, or any other sum. Clearly under the pleadings the Government could not rightfully recover a judgment against the defendant bank for the misappropriation of these funds, when the evidence, without contradiction, shows that a part of it

went where the Government intended it should go. It was for the jury to determine what the amount of the credit should be. Upon what principle of law or morals should the Government be permitted to recover for a loss, which, under the evidence in this case, it is plain it did not sustain? Were this case pending in the courts of the State of Washington the Supreme Court, on appeal, would have the power, and it might be its duty to reduce the judgment by the proper amount of credit to which the defendant was entitled. But if we understand the rule in this Court, and in the Federal Courts generally, this Court cannot in this action modify the judgment, but must reverse the action and send it back for a new trial. If the defendant were entitled to any credit of any sum the result must be the same,—the judgment of the lower court must be reversed.

This Court has uniformly held that if there is any evidence sufficient to go to the jury in support of the allegations of the complaint, or of an affirmative defense, it is the duty of the Court to submit the question to the jury, and we think there can be no doubt that a careful examination of McCoy's testimony will convince this Court that it would be most

unjust and unconscionable to permit the United States to recover a judgment in this case against the defendant for a sum manifestly from two to four thousand dollars in excess of any possible loss that it has sustained.

FICTITIOUS PAYEES.

Notwithstanding the language of the decision of this Court in the case of *United States vs. The National Bank of Commerce*, 205 Federal, 433, we again desire to present our contention that the checks in question were in legal effect negotiable instruments, payable to bearer, and that no liability resulted to the defendant bank in paying the checks as they did, even though the money was in the end misappropriated by McCoy to his own use.

This Court will bear in mind that M. P. McCoy, Examiner of Surveys and Special Disbursing Agent, was the party in whose name the deposit was made upon the books of The National Bank of Commerce; that his signature was furnished to the bank by direction of the Secretary of the Treasury. The bank was notified that McCoy was the only person authorized to draw checks upon that account. He was clothed by the Government with authority to issue

checks upon this fund. The Government permitted him, as its agent, to issue negotiable paper and to place the same in circulation; McCoy affixed his genuine signature to each of the checks in controversy; he made the checks payable to fictitious payees, and endorsed the checks in the names of the payees and through the agency of other banks succeeded in getting the money into his possession.

"A check is a bill of exchange drawn on a bank, payable on demand. Except as otherwise herein provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

2d Rem. & Bal. Code, Sec. 3575.

"A bill of exchange is payable to bearer: 'When it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable.' "

2d Rem. & Bal. Code, Sec. 3400, Sub-div. 3.

"Where the drawer of a check intended to use the name of payee and did use it, as that of a person who should never receive the check nor have any right to it, such payee, though an existing person, was a fictitious one within the negotiable instruments act of May 16, 1901, making a check payable to bearer, if payable to the order of a fictitious or non-existing person, and such fact is known to the person making it so payable."

Snyder vs. Corn Exch. Nat'l Bank, 70 Atl., 876.

"As the payee had no interest and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person the holder may declare and recover upon it as a bill payable to bearer."

Snyder vs. Corn Exch. Bank, supra.

In the case of *Phillips vs. Mercantile National Bank of New York* (140 N. Y., 556; 35 N. E., 982; 23 L. R. A., 584), the Cashier of the National Bank of Sumpter, S. C., had authority from it to draw checks or drafts upon the Mercantile National Bank of New York, where it had an account. He drew checks upon that bank making them payable to the order of existing persons, but without their knowledge, and then endorsed the checks in their names to a firm of stockholders in New York, who collected them from the Mercantile Bank. The Receiver of the Sumpter Bank brought suit against that bank to recover back the amounts which it had paid on Bartlett's checks, on the ground that the endorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were

those of existing persons, and were therefore to be regarded as having been made payable to bearer and intended for delivery to stockholders in New York. This having been the intent of Bartlett, who had authority from his bank to draw the checks, his intent—so far as the New York Bank was concerned—was said to have been the intent of his bank and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the Court in that case said:

"Whether endorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that act did not affect the title or rights of the defendant."

In this case it cannot be successfully maintained that McCoy did not know at the time he drew the checks that they were made payable to fictitious persons. It is true that he intended to perpetrate a fraud, but the statute does not say that the drawer of the check shall have knowledge of the fictitious or non-existing payee, but the fact must be known to the person making the check so payable. The statute does not limit the case to drawers of checks or makers of negotiable paper, but goes

farther and applies not only to the maker but to the person who has the power to draw the instrument and to put it into circulation.

We note that Court says in the opinion upon the former hearing of this case, at page 438:

"But we are inclined to the view that the United States is the drawer of the checks, and that the knowledge of McCoy is not to be imputed to the Government. He was the Government's agent, it is true, but he was not the Government's agent to draw checks to fictitious payees. In drawing such checks he was not only acting without authority, but in violation of his instructions, and in fraud of his principal."

Had the account in The National Bank of Commerce been placed there to the credit of the United States and McCoy was authorized to draw checks upon that account, then we think the Court's comment might not be inappropriate. But such is not the case. The money was placed in the bank to the credit of McCoy. True he was called the agent, but the legal title to the account was vested by the Government in McCoy. He was the only person authorized in his dealings with the bank to check upon the account. He had the legal title to the money just as much as though the money itself was in his possession. Had the Government placed the money in his hands and he had paid it out contrary to his in-

structions, the person who received the money certainly would have been protected, for the reason that by placing the money and the legal title to it in McCoy's hands the Government clothed him with the authority to dispose of it.

We do not think that any of the cases cited by counsel in the former hearing, or referred to by the Court in its opinion bear out the statement of the Court. The facts in all the cases were entirely different. In none of the cases as we read them were the facts similar to those in this case. Here, by the action of the Government, the legal title to the money was placed in McCoy's hands, and the uncontradicted testimony is that McCoy presented to the bank his letter of instructions, and that that letter of instructions authorized the bank to take McCoy's signature and to honor all checks drawn by him. (Record, pp. 67, 69, 70.)

In the case of *United States vs. National Exchange Bank*, 45 Fed., 163, a party feloniously and by false identifications succeeded in procuring a check from the postmaster of Milwaukee; the check was made payable to the party entitled to receive the money, but it was delivered to a party not entitled to it, the postmaster acting in good faith

in issuing the check and delivering it to such imposter. The bank paid the check and paid it to the identical person to whom the postmaster intended it to be paid. In that case the postmaster kept his account in the same way that McCoy kept his account with the National Bank of Commerce. He went with the imposter to the bank and identified him, and upon such identification the bank paid the check. Subsequently the government brought suit against the bank for the recovery of the money, and the Court held that the bank was not liable for the reason that the money was paid to the person to whom the postmaster intended it should be paid.

In this case the bank paid the money to the person that McCoy intended should receive it. McCoy put the paper into circulation and through his acts, representing the government, caused the money to be paid to the wrong person. The Court held that the bank was not in fault and that the government was not necessarily in fault and therefore allowed the loss to fall where chance placed it, viz: upon the government.

The case of *Hermon vs. Old Detroit National Bank* (116 N. W., 617; 17 L. R. A., N. S., 514) cited by counsel, distinguishes the case of the

United States vs. National Exchange Bank, 45 Fed., 163. In that case the Court says:

"In that case, the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was, of course, with the drawer and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee."

And in the same case the Court says that the statute in question relating to fictitious payees applies only in cases where the drawer knowingly draws the check to the order of a fictitious payee. But in the *Harmon* case the Court recognized the distinction that we are endeavoring to present, *i. e.*, that McCoy and the postmaster occupy similar legal positions: both the agents of the government; both had the deposit placed in their names; and in the Harmon case the Court clearly recognized the authority of the postmaster, who was only a special agent of the government, to draw the check and identify the payee, or to make the check payable to bearer, and that by doing so he relieved the bank of any liability for paying it to the wrong person. McCoy, in drawing the checks, was acting in the line of his duties and had the right to draw checks

upon the deposit of the government to which he had the legal title, and there is no reason that occurs to us why a different rule should prevail in the case of the government from the rule that does prevail against private individuals. If the agent acts within the scope of his powers the government is necessarily bound by his acts. When the government enters into the business of dealing in negotiable paper it becomes bound by the laws regulating the issuance of negotiable paper to the same extent and in the same way that a private individual is bound. It is subject to the same rules and the same regulations that control private individuals. In its sovereign capacity it is free from suit without its consent and the statute of limitations and laches do not bind it; but when it becomes a party to a negotiable instrument it is bound exactly like other parties. The duty of giving notice of protest, of making demand, and various other duties imposed by the law merchant have been held to apply to the United States.

In the case of *Cooke vs. United States* (91 U. S., 395), the Court says:

"Laches is not imputable to the government in its character as sovereign by those subject to its dominion. Still a government may suffer loss

through the negligence of its officers. If it comes down from its position of sovereignty and enters the dominion of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange it must use the same diligence to charge the drawers and endorsers that is required of individuals, and if it fails in this its claim upon the parties is lost. Generally in respect to all the commercial business of the government, if an officer socially charged with the performance of any duty and authorized to represent the government in that behalf, neglects that duty and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fails in this, it fails in the performance of its duties and must be charged with the consequences that follow such omissions in the commercial world."

Would it be seriously contended that if a private corporation had deposited money in the defendant bank to the credit of its agent, and authorized him to draw checks against the fund, that he would not have the authority to draw a check to a fictitious payee? As between himself and his principal he might not, but as between the bank and himself manifestly he would. The principal that clothes its agent with the authority to so use

his power as to perpetrate fraud must bear the loss if fraud be perpetrated, rather than the innocent party; and if McCoy, at the time he issued the checks intended to have the payees fictitious persons, then it seems to us that the checks were made payable to bearer and the bank was under no responsibility whatever in the premises.

The formalities with which the checks were issued were known to the Government and the checks were received by the Government at stated intervals during the time it was doing business with the defendant bank. No protest or objection was ever made as to the particular requirements of the checks. If the checks did not comply with the regulations the Government should have objected; not having objected it must follow that they were waived.

RECIPROCAL DUTIES BETWEEN BANK AND DEPOSITOR.

But whether this Court recognizes the authority of McCoy to draw bills of exchange or checks payable to fictitious payees or not, still the action of the lower court in granting the instructed verdict was clearly erroneous for other reasons. We

have insisted that the money was deposited to McCoy's credit and that the relation of debtor and creditor existed between McCoy as agent and the bank and that McCoy had authority to check on it without limitations or conditions, as he said in his testimony. But for the sake of argument assume that the money deposited to McCoy's credit at all times belonged to the Government. Then it must follow that the relation of debtor and creditor existed between the United States and the defendant bank. And, as was said in the case of *Cooke vs. United States, supra,* when the Government enters into commercial transactions it abandons its sovereignty and becomes bound by the ordinary usages and customs of commercial business and becomes bound by the rules regulating and controlling reciprocal obligations existing between a bank and its depositors. Among these obligations is the duty of the bank to furnish periodical statements of the condition of the account to the depositor. This is partly for the protection of the depositor and partly for the protection of the bank.

"It has long been the usage of banks to give out passbooks to their customers, in which the latter are credited with their proper deposits. These passbooks are sent in as occasion may seem to demand,

often periodically and by request of the bank as well as upon the volition of the depositors, and are posted or statements returned with them along with the paid checks or vouchers, showing the condition of the depositor's account upon the books of the bank. It matters little whether the passbooks are sent in voluntarily or by request of the bank to be posted—the purpose and effect of the statements rendered by the bank in connection therewith are the same. They not only afford means whereby the depositor may discover errors to his prejudice, but furnish evidence in his favor in the event of dispute or litigation with the bank. They serve to protect him against the carelessness or fraud of the bank. The right thus accorded by banks to frequent accountings in this manner, so that the depositor may keep informed as to the condition of his account, as it appears upon the books of his depositary, is one of such manifest advantage that it entails a correlative duty upon the depositor. It requires of him an examination of the account rendered, and, if errors or omissions become apparent, it is then incumbent upon him to bring them to the attention of the bank, by returning his passbook for correction, or by other convenient method. Otherwise his silence will

be regarded as an admission that the entries as shown are correct."

National Bank of Commerce vs. Tacoma Mill Company, 182 Fed., 6.

"The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a passbook."

Leather Manufacturers' Bank vs. Morgan, 117 U. S., 96.

In the *Tacoma Mill Company* case, *supra*, the entire subject of the correlative duties between bank and depositor is considered and the authorities reviewed, and the court says:

"It being the duty of the depositor to examine the statements of his bank when periodically balancing his passbook, it must follow that he is charged with knowledge of what those statements contain, whether he makes the examination in person or through an agent designated for the purpose. Logically, also he must know the state of his own accounts, if regularly and honestly kept. He is not bound to know what a dishonest clerk may have inserted therein, contrary to the fact and with a purpose of deceiving and defrauding him, but he would be bound to know what the legitimate facts or entries would disclose if followed to their natural sequence in the exercise of ordinary business care and alertness. That is to say, if legitim-

ate entries and the manner of their entry in books of account or books of business memorando would be suggestive of other facts, or would lead to further inquiry before an ordinarily prudent man, acting in business concerns, would be satisfied, then the principal must know what the inquiry would result in if the information at hand were follwed to its natural conclusion."

The doctrine of the above mentioned case is in line with the principles of the leading decisions of the United States Supreme Court and other courts.

Now let us apply the foregoing principles of law to the facts in this case. McCoy was the agent of the government; he rendered to the government weekly, monthly and quarterly statements; sent to the government forged pay-rolls, forged vouchers and forged receipts for a period of more than two years. His duties were to examine in the field one-tenth of the actual surveys of various townships of the public domain and he was required to and did send in to the government reports, maps, drawings, and field notes of his work. The slightest examination or inquiry on the part of the Government would have immediately disclosed his fraudulent practices and would have prevented a continuation of them, and would have rendered it impossible for him to have succeeded in defrauding either the Government or the bank. He was con-

stantly in the city of Seattle and sent his reports to the Government as to his field work and of his expenditures in doing the work from Seattle; he sent in reports covering his field work in Washington, Montana and Idaho, giving the names and post office addresses of the fictitious persons whom he claimed to have employed. With the vast army of secret service men employed by the Government it would seem that it was the grossest carelessness on the part of the Government not to have discovered, for considerably more than two years, that McCoy's maps and field notes were made up without his ever having gone upon the ground himself. An inquiry addressed to any of the local employes of the Government in the land department, the treasury department, or the legal department, would have enabled the Government to discover that his whole course of conduct was saturated with fraud.

Moreover, the defendant bank paid the checks drawn by McCoy upon his bank account, made out in his handwriting and signed by his guaranteed signature; paid them, however, through other banks. His account with the bank was balanced each month and a statement of the same furnished to him, and a statement furnished to the Treasury Department.

Every three months all of the vouchers drawn by him were forwarded by the bank to the Government and were retained by the Government, as well as the statements, without question or protest. The Government was charged with the money that McCoy drew and acquiesced in his method of doing business. No protest was ever made by the Government either as to the form in which the checks were drawn or the fact that in many instances they failed to state the purpose for which they were drawn; and it was at all times within the power of the Government to have discovered, by the exercise of even ordinary diligence, his fraudulent practices.

Had the Government exercised this ordinary diligence promptly, then no damage would have resulted, except as to the earlier fraudulent acts. It was the duty of the Government to exercise at least ordinary diligence in investigating the acts of its agent, and such investigation would unquestionably have led to the discovery of the fraud.

The Government did not do this, and now seeks to compel the bank, that acted in good faith and with due diligence, to save it harmless against the loss brought about by its own negligence, and which could not have happened had it been diligent.

Judge Hanford in ruling upon the demurrer (Record, p. 17) clearly expressed the general rule of law and while he held that the statute did not apply did hold that the rule of law expressed in the statute had substantially the same force without the statute. The following is his language:

"There may be good ground for holding that the statutes that have been cited are not applicable or controlling, but without any statute the rule of honest, fair dealing between contracting parties applicable to this case, is that bankers must bear losses from paying bad checks. When a check is presented for payment, the banker has a right to know, to be assured before paying, that the person demanding payment is the identical person entitled to receive the money. If a check is written payable to a person, or supposed person, or to his order, the bank is not obliged to pay that check until the holder identifies himself as the payee, or endorsee and offers satisfactory proof of the genuineness of every endorsement thereon. That is a natural right incidental to a banker's liability for making a payment to a person having no right to demand it. Now, tracing that same rule a little further, where the bank has been deceived and has paid a check which ought not to have been paid, early information of the error is necessary to preserve the right of recourse against whomsoever may be primarily responsible for the error and the depositor is the one best qualified to discover errors, so that there is a presumption that he will, upon inspection of checks that have been paid, discover a bad check if there is one, and he is obligated to be vigilant and prompt to report errors. There-

fore, where there is a running account between a depositor and a bank, and monthly statements are made to the depositor, with a surrender of his checks that the bank has paid, according to the rule of honesty and fair dealing the depositor becomes bound to look at the return and report any error promptly. The rule between individuals having mutual running accounts is that an account stated becomes an account proved, if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. There is a good reason for this, which this case demonstrates, for if the plaintiff had acted with promptness in checking up the returns made by the defendant, as pleaded in its answer, the fraudulent practice would have been discovered and stopped and all parties could have been protected. The failure of the Government to examine these returns and report errors in time, was a cause of the successful practice, or continuance of those frauds, and was necessarily detrimental to the defendant. That failure on the part of the Government counterbalances any neglect to discharge its obligation on the part of the defendant bank. There has been a loss suffered by reason of mutual neglect by plaintiff and defendant. Now, who should bear that loss? I think that the common law rule, that where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case that rule leaves the loss resting upon the plaintiff. The Court sustains the demurrer to the first affirmative defense and overrules it as to the second."

In the latter part of Judge Hanford's decision he says that where both parties have been

negligent and a loss has occurred, the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. So it would seem that if both the Government and the bank were acting in good faith and that the loss has resulted by their mutual mistakes or mutual neglect, then the loss shall remain where it has fallen.

Counsel may be relying upon the case of *United States vs. National Exchange Bank*, 214 U. S., 302, but the facts in that case are entirely different from those in this case. In that case the United States sought to recover payments made at the United States Sub-Treasury at Boston upon 194 pension checks, the signatures or marks of the persons to whom the checks were payable having been forged. Upon receipt of pension vouchers regular in form and purporting to be executed by the pensioner named therein but which in fact were forged, the United States Pension Agent at Boston drew checks upon the Sub-Treasury at Boston, aggregating $6,362.07, in favor of the pensioners named in the vouchers and transmitted said checks by mail direct to the address of each pensioner, as given in the vouchers. The checks, with the purported

endorsements thereon of the payees, were cashed by the Exchange Bank and immediately endorsed to a National Bank at Boston for collection. The checks were presented by the collecting bank at the Sub-Treasury of the United States at Boston. The collecting bank received payment for the same and accounted for the payment to the Exchange Bank.

In this case the Court held the United States could recover and at the conclusion of the opinion the Court said:

"Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged endorsement having been broken at the time the checks were cashed by the United States and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which, by the operation of the legal warranty, were presumably within the knowledge of the defendant.

"The conclusion to which we have thus come renders it unnecessary to consider whether, if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery, if there was lack of such diligence it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay."

In this case the defendant paid these checks

with fictitious endorsements, charged the amount thereof to McCoy's account and promptly notified the Government of such charge. The Government received the accounts and vouchers and has presented them in this case. It was the duty of the Government to have made a demand upon the defendant for the money and it has assumed this burden by making and pleading the demand; but it did not do so until six months after the discovery of the forgeries. The evidence shows that during all the months between the discovery of the forgeries in September, 1909, and the demand upon the bank on March 5th, 1910, the Bank of Commerce had rendered monthly statements of its accounts to the various banks from whom it received the checks in question for collection. It might have recovered the money had the notice of the forgeries been promptly given. Its recourse against these forwarding banks from whom it received the checks is now doubtful and the defendant has sustained an injury, at least to the extent of rendering it extremely doubtful as to its right of recourse against the forwarding banks.

In the case of *Exchange Bank vs. United States*, 151 Fed., 407, it is said:

"None of the cases made any exception of the kind claimed by the United States in the case at bar, namely, that the defending bank, in order to meet the demand of the United States, is bound to establish that it suffered detriment by the delay. * * * Some of the cases in discussing the matter differ as to the equities under circumstances like those before us. Some hold that the loss should be allowed to remain where it fell. However this may be, any demand for prompt notice in cases of forgeries is wholesome. When discovered, forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned; and any attempted test with reference to the question whether the party from whom recovery is sought has suffered by delay is wholly unsatisfactory, because the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts.

"Consequently, if this were a case of commercial paper proper as known in the law of merchants, and between individuals, it is established that unreasonable delay in giving notice after the discovery of the forgeries would have discharged the Exchange Bank, without regard, ordinarily, to any question whether it suffered damage thereby. This, of course, is an exceptional rule, applicable to distinctly commercial paper, because with regard to liability for money paid on a signature supposed to be genuine, but forged, or paid under any other mistake, in ordinary transactions it is admittedly necessary that damage should have ensued by reason of any alleged negligence in giving notice of the facts. In conclusion as to this topic, the rule as we understand it is in entire harmony with the

fundamental principles of that portion of the commercial law which relates to giving parties to commercial paper notices of defaults. They insist upon promptness, but ordinarily require no proof, pro or con, on the question whether damage resulted from delay."

When the Government received the periodical statements from the defendant bank and made no objection or protest against the correctness of the same for a period of more than two years, the presumption arose that the Government had acquiesced in these statements and the account as between the Government and the bank became a stated account and in order to evade the effect of this condition the Government by the testimony admits that by the exercise of the slightest investigation it could have discovered the forgeries and fraud and could have protected itself and the bank. It therefore admits its own negligence and yet seeks to have the stated account set aside and seeks to recover from the bank for a loss occasioned by its own negligence. It repudiates the acts of its own agent, ignores all of the equities in the case and the rights of the defendant bank and seeks to take advantage of its own wrong. It has continuously refused to surrender the vouchers so that the de-

fendant bank might proceed against the other banks to whom it paid the money on the checks; it has acted in utter disregard of the rights of the defendant and has thrown every obstacle in the way to prevent the bank from recouping its losses by proceeding against third parties. It admits that it could have discovered the frauds, but did not do so, and yet seeks to compel the bank, an innocent party, to pay the loss sustained by the Government and acquiesced in for a period of more than three years. It clothed McCoy with the power to draw the checks upon the defendant and with full knowledge of the drawing of such checks and their payment by the bank, the Government stood by and exerted its utmost efforts to prevent the bank from recovering the money from third parties and has rendered it impossible for the bank to successfully prosecute any action against third parties for the recovery of the sums in controversy, by withholding the checks. It has disregarded the universal rule requiring a party who receives forged instruments to immediately give notice of the forgeries upon their discovery, and to return the documents.

If ever a case existed where the rule of law requiring the loss to remain where it falls should be enforced, this is such a case. Even though for the sake of argument it might be conceded that the bank should not have paid out the money without a more strict identification of the payees and was, therefore, guilty of some negligence, still the laches, and delays, and refusal to return the documents on the part of the Government rendered the Government guilty of contributory negligence and the action of the lower Court in granting the non-suit was clearly justified by the record in the case and by the law.

INSTRUCTIONS REFUSED.

The first instruction requested by the defendant was as follows:

"The defendant in this case has alleged as an affirmative defense that the money sued for in this action, whether passing through the hands of fictitious payees or otherwise, was expended and used by M. P. McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States and in payment of claims that the said McCoy, as Special Examiner

of Surveys, was authorized to make and pay on behalf of the United States.

"If you find from the evidence in this case that the money sued upon in this action was withdrawn from the defendant bank and was expended by McCoy in payment of claims against the United States which McCoy as Special Examiner of Surveys was authorized to pay on behalf of the United States, then I instruct you that the plaintiff cannot recover in this action for the reason that the United States in such case would have suffered no damage.

"I further instruct you that if you find that any portion of the money sued for in this action was so expended by the said McCoy in payment of legitimate claims against the United States created by him and which he had a right to create, then I instruct you that the plaintiff cannot recover for such portion of the sum sued upon as was so expended by the said McCoy."

This instruction correctly states the law and the refusal of the Court to give this instruction and submit the case to the jury was clearly error. The issue was clearly made as to whether or not McCoy had misappropriated the funds in defendant's bank belonging to the Government. If the Government did not sustain the loss and the money was expended by McCoy for legitimate purposes in connection with the performance of his duties as Examiner of Surveys, then the Government, to

that extent at least, failed in its proof, and it was the duty of the Court to submit the question to the jury and it was for the jury, upon the ample evidence introduced, to determine to what extent the Government had failed to establish its right to recover the amount sued for.

The second instruction requested by the defendant was as follows:

"It is contended by the plaintiff that there is due the United States from the defendant bank the sum of $15,129.81, for moneys fraudulently withdrawn from the defendant bank by M. P. McCoy. The defendant, among other things, contends that in any event it is entitled to credit upon the sum of $5,718, being the amount that the said McCoy was charged, in an indictment by the United States against him, with embezzling, upon which indictment the said M. P. McCoy was convicted and sentenced to the penitentiary for a term of years.

"If you find from the evidence in this case that the said sum of $5,718, referred to in said indictment and introduced in evidence in this case, constituted a portion of the $15,129.81 sued for in this action, then I instruct you that the plaintiff cannot recover for the said sum of $5,718, and such sum must be deducted from the total amount of $15,129.81, for the reason that the judgment of conviction against the said M. P. McCoy upon said indictment conclusively established the fact that such sum of $5,718 was the money and property of the United States, and by filing such indictment against the said McCoy for such sum and procur-

ing a conviction thereon, the United States elected to treat said sum mentioned in said indictment as its own property and thereby waived its claim for said sum against the defendant bank."

The third affirmative defense alleges that subsequent to the issuance of the checks described in the complaint and their payment by the defendant, the plaintiff, with full knowledge of the facts, ratified and approved the action of M. P. McCoy in drawing such checks in the way in which they were drawn and the action of the defendant in paying them and charging the amounts thereof to the accounts of the plaintiff, carried on the books of the defendant in the name of M. P. McCoy, as Examiner of Surveys and Special Disbursing Agent.

The relation of debtor and creditor existed between the bank and McCoy as such Examiner of Surveys and Special Disbursing Agent, or the relation of debtor and creditor existed between the bank and the Government. The title to the money so deposited by the Government became the money of the bank from the moment the deposit was made and the bank owed the money to the Government or McCoy.

On the first of September, 1909, after the dis-

covery of the defalcations of McCoy, the United States caused McCoy to be indicted by the Grand Jury. The indictment is found on page 119 of the record, and it is specifically charged therein that McCoy: "did, by virtue of his said office and employment and while so employed and acting as such disbursing officer of the United States, receive and take into his possession certain public moneys of the United States, to-wit, the sum of $5,718 lawful money of the United States of America then and there the property of the United States * * * and the said McCoy did then and there wilfully, unlawfully and fraudulently embezzle and convert to his own use said public funds of the United States, to-wit $5,718 lawful money of the United States."

Upon this indictment McCoy was convicted and sentenced to the penitentiary and served his term for embezzling the funds of the United States.

One of two things must be manifest. Either McCoy was wrongfully convicted and sentenced to the penitentiary or the allegation of the indictment is true, that the money McCoy embezzled was the money of the United States.

The Government, acting through the Department of Justice, and presumably under the direc-

tion of the Attorney General of the United States—the head of one of the great departments of the Government, charged in the indictment that the money McCoy embezzled was the money and property of the United States. The jury found such to be the fact, and the Court, by entering the judgment against McCoy in the criminal case found as a fact that the $5,718 was on the first of September, 1909, or at the date of the indictment and trial, the property of the United States. The Government, therefore, in the most solemn way, elected to treat the money that McCoy had embezzled as the money of the Government and not the money of The National Bank of Commerce. Its action, in legal effect, amounted to a clear-cut unqualified ratification of the action of McCoy in withdrawing the funds upon his checks payable to fictitious payees. It is said that McCoy had withdrawn the money from the bank fraudulently, but that the money when so withdrawn from the bank became and remained the money and property of the United States. No more solemn and convincing proof of the election upon the part of the Department of Justice to treat the money as the money of the Government and not the money of the bank could

be produced. This action was equivalent to the Government saying: "We recognize and approve of McCoy's authority to get possession of this money in the fraudulent way he did get possession of it, and the Government will punish him for the embezzlement of the funds."

The moment McCoy drew the checks and got the money it became the duty of the Government to elect whether it would look to McCoy for the return of these funds or look to the bank. It could not do both. Even though the payment by the bank to McCoy through the medium of fictitious payees was in the first instance unauthorized, still this action on the part of the Government was a subsequent ratification of the authority of McCoy to so withdraw the funds in the manner and by the means utilized by him.

When the Government comes into the courts as a suitor it submits itself to the jurisdiction of the Court and is bound by the same rules of evidence and by the same principles of law as any other suitor. It did come into the Court, after the defalcations had occurred and after the Government had acquired full information and knowledge as to all of the facts concerning the same, and caused McCoy

to be indicted, prosecuted and convicted upon the theory and upon the solemn allegation that the Government had elected to ratify his act in withdrawing the funds from the bank, and alleging that after he had withdrawn the funds they became the money of the United States. Such being the case why should not the Government be bound by its election to treat the $5,718 as the money of the Government and not the money of the bank, in the same way as though a private individual had made such election.

Suppose that The National Bank of Commerce, after the defalcation, had filed a complaint before the United States Commissioner charging McCoy with the embezzlement of $5,718, then and there the property of the bank, and had sworn to the complaint, and afterward assisted in the prosecution of McCoy for embezzling the bank's funds. Would not the Government have contended in this action that such procedure on the part of the bank clearly amounted to an election by the bank to treat the money so embezzled or stolen by McCoy as the money of the bank and not the money of the Government? Surely the Government ought not to stand in any better position than that of any other

litigant; and it will not do to say that the courts and the United States District Attorney did not have authority to bind the Government by such action upon its part.

All of the proceedings in the District Courts instituted by the United States are under the supervision and direction of the Attorney General. The Attorney General is a member of the Cabinet and his department is certainly of equal rank with that of the Treasury Department. Suppose the Secretary of the Treasury, when he was in possession of all the facts relating to McCoy's misdoings had expressly ratified his action in withdrawing the funds from the bank in the manner in which he did withdraw them, would not the Government be bound? The position of the Secretary of the Treasury is no more exalted than that of the Attorney General of the United States.

Again, suppose that after McCoy had withdrawn this money from the bank he had paid the same over to the Government, and the Government, with full knowledge of the fact had received the same, thereby ratifying McCoy's action in checking the money out of the bank, could it be reasonably asserted or contended that the Government, not-

withstanding its receipt of the proceeds of the checks, could, nevertheless sue the bank, as it is doing in this action. The Court will remember that this indictment was not found until, as the evidence shows, the Government was fully and completely advised as to the exact facts surrounding the defalcations of McCoy. The instruction clearly stated the law and the case should have been submitted to the jury under the instruction requested. The defendant bank was clearly entitled to have the jury instructed that in no event was the plaintiff entitled to recover from the defendant the $5,718, the withdrawal of which from the bank had been ratified and confirmed by the Government; and the defendant was entitled to a credit of that sum upon the amount claimed in the prayer of the complaint.

One of the issues in the case under the pleadings was the ratification on the part of the Government of the acts of McCoy in withdrawing these funds from the bank. The indictment itself, as well as the testimony of McCoy furnished the proof of the ratification. This proof was not attempted to be contradicted by any evidence on the part of the Government. On the contrary, at page 75 of the

record Mr. Fishburne stated that he would stipulate that McCoy was indicted, arrested and convicted of the embezzlement covered by the checks shown in Exhibit "A" and it was stipulated that the indictment should be introduced, showing the charge against him.

The indictment not only amounted to a ratification of McCoy's acts in withdrawing the money from the bank, but it amounted to a recognition by the Government that the title to the money passed from the bank to the Government and went into the possession of McCoy as the agent of the Government. Without such title and possession the crime of embezzlement could not have been consummated.

The ratification is so plain that it needs no argument nor citations to convince the Court that the case should not have been taken from the jury, but that the question of ratification should have been submitted to the jury for their determination. Therefore, it seems to us to be perfectly manifest that the lower Court was in error in directing an instructed verdict.

"The underlying principle of all the decisions is that when the sovereign comes into Court to assert a pecuniary demand against the citizen, the Court has authority and is under the duty to with-

hold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject matter between man and man. The acts or ommissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the Government. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the Courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any one person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application."

Walker vs. United States, 139 Fed., 413.

Lindsey vs. Hawes, 2 Black, 560.

Davis vs. Gray, 16 Wall., 203.

U. S. vs. Bank of Metropolis, 15 Pet., 392.

Sinking Fund Cases, 99 U. S., 719.

U. S. vs. Barker, 12 Wheat, 559.

Cooke vs. U. S., 91 U. S., 398.

Duval vs. U. S., 25 Ct. Cl., 60.

Hartson vs. U. S., 21 Ct. Cl., 456.

"Whenever an affirmative act is necessary on behalf of the United States to effect or enforce a pecuniary right against an individual, the officer or department whose duty it is to do that act represents the United States as to that matter, and it is bound by his action or nonaction."

U. S. vs. Barker, 12 Wheat., 559.

U. S. vs. Bank, 15 Pet., 377.

The officials of the Department of Justice were charged with the duty of determining the effect of the transactions surrounding the defalcations of McCoy. It was their duty to determine whether they would treat the money appropriated by McCoy as the property of the United States or of someone else. The determination of this fact and this question was within the scope and powers of those officials presumably acting under the direction of the Attorney general, and there is no reason why the United States cannot be bound by its election in the same way as a private individual would be bound who acted in a similar way under similar circumstances.

The sixth instruction requested by the defendant was as follows, and should have been given:

"If you find from the evidence in this case that at the time the account was opened in The National

Bank of Commerce by the United States in the name of M. P. McCoy, Examiner of Surveys and Special Disbursing Agent, the plaintiff instructed the defendant bank to honor all checks drawn upon said account by the said M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, without limitation or condition, then I instruct you that defendant had the legal right to honor any checks so drawn by said McCoy regardless of the fact as to whether the payees were fictitious or otherwise, and if you find that such special instructions were given at the time of the opening of said account, then I instruct you that such special instructions would justify the defendant bank failing, if it did fail, to follow the general instructions issued by the Treasury Department of the United States."

The testimony of McCoy (Record pp. 63, 78, 79, 81) shows that at the time the deposit was made in the defendant bank by the Government to the credit of McCoy, the Secretary of the Treasury wrote a letter to McCoy, with directions to submit the letter to the bank; that McCoy did submit such letter to the bank, and that the letter instructed the bank to honor all checks drawn upon that account "when signed by M. P. McCoy, Examiner of Surveys and Special Disbursing Agent" without restriction or limitation. It is true that the general printed instructions of the Secretary of the Treasury might be evidence that would tend to contradict the testimony of McCoy as to the special letter of in-

structions given to him and submitted to the bank, with reference to his unlimited power to draw checks upon this account. There was, therefore, evidence as to his unlimited power to draw checks and there was evidence, as shown by the general instructions, tending to contradict this. There can be no question that the Secretary of the Treasury might promulgate certain regulations affecting United States depositors, but a letter written subsequent to these general instructions would amount to a modification of the general instructions. The letter would emanate from the same source as the instructions; the same authority that issued the instructions issued the letter. It was for the jury to weigh the evidence and for them, under proper instructions from the Court, to determine whether such a letter was written, and whether the special letter should prevail over the general instructions. This instruction undertook to so advise the jury as to their duties in determining the weight to be attached to this letter. Suppose it should be conceded that the letter in this particular instance did instruct the defendant bank to pay these checks when presented by McCoy without reference to the general instructions contained in the promulgated

circular. Then would it not have been the duty of the Court to have instructed the jury on the subject?

Now there was evidence to support the existence of such a letter and its contents. It was for the jury to determine whether it was ever written, and not for the Court. There was certainly ample evidence to support a finding if it had been made by the jury that such a special letter was written, authorizing the bank, unconditionally and without limitation, to honor any checks signed by McCoy. It was certainly erroneous for the Court to eliminate this question from the jury, and is an additional ground for asserting that the Court erred in directing a verdict.

The seventh instruction requested by the defendant should have been given, which instruction is as follows:

"If you find from the evidence in this case that the United States, by its properly authorized officers, ratified and approved the actions of the said M. P. McCoy in drawing the checks referred to in the complaint, and ratified the action of the defendant bank in paying such checks, if you find that it did pay them, and in charging the amounts of such checks to the account of the defendant, then I instruct you that such ratification and approval by the United States would estop the plaintiff from

a recovery in this action, and your verdict would be for the defendant."

The eighth instruction requested by the defendant should have been given, which instruction is as follows:

"If you find from the evidence in this case that the said M. P. McCoy was authorized to expend such portion of the money deposited to his account in the defendant bank for legitimate purposes in connection with the expense attendant upon the examination of surveys as he deemed expedient, then I instruct you that the burden rests upon the plaintiff in this case to establish by a preponderance of the evidence the fact that the money involved in this controversy was used by the said McCoy for purposes other than his legitimate expenses; and the burden also rests upon the Government to establish by a preponderance of the evidence what portion of the amount involved in this controversy was improperly expended by the said McCoy."

II.

A NEW TRIAL SHOULD HAVE BEEN GRANTED.

The first ground of the motion for a new trial was on account of error at law occurring at the trial, and excepted to by the defendant, which error consisted in granting the motion of the plaintiff for a directed verdict.

The reasons we have heretofore urged are ap-

plicable to the assignment as to the first ground of the motion for a new trial, and we do not consider it necessary to elaborate any further thereon.

The second ground of the motion for a new trial was as follows:

"Upon the ground of newly discovered evidence, material for the defendant and which the defendant could not with reasonable diligence have discovered and produced at the trial."

The affidavit of E. S. McCord (Record pp. 173, 174, 175, 176, 178 and 179); of J. A. Swalwell (Record 177); of Richard D. Lang (Record 187-8); of Abner H. Ferguson (Record 189-192); as well as the affidavit of George P. Fishburne (Record 180-181) and the statement from the books of the Treasury Department at Washington (Record pp. 183-4) contain the evidence presented to the Court upon said motion for a new trial, and all of this evidence has been made a part of the bill of exceptions filed herein.

The evidence upon the motion for a new trial disclosed that M. P. McCoy, during the time he was in the service of the Government had executed to the United States a bond with the United States Fidelity & Guaranty Company as surety, conditioned for the faithful performance of his duties

as Examiner of Surveys and Special Disbursing Agent and for the accounting to the Government for all moneys coming into his hands as such agent, and that the bond did not provide the surety should be responsible for any salary paid to the said McCoy by the United States which said McCoy did not earn; that during a considerable portion of the time McCoy was employed by the Government he received a salary of $270 per month; that the Government collected from the surety company the sum of $3,000 upon the bond McCoy had given.

The Government after, or at the time of the collection of this $3,000 from the surety company proceeded to reconstruct McCoy's account with the Government, and charged back to his account $3,000 on account of salary, which it was claimed McCoy did not earn during the time he was perpetrating the frauds in question. After the account had been so reconstructed and McCoy had been charged with $3,000 on account of salary claimed to have been improperly paid him, the Government credited upon his account the $3,000 collected from the surety company.

The defendant at the time of the trial knew nothing of these facts in regard to the collection of

such money from the surety company, and did not know that the Government had ever received anything from McCoy or his bondsman, and only discovered the same after the trial of the case, and immediately began to investigate the facts with regard to the same, and ascertained them to be as above stated, and as shown in the record above referred to.

The defendant proceeded with due diligence and was guilty of no laches. It could not assume that the Government of the United States would undertake to collect from the defendant bank a sum greater by $3,000, or any other sum, than the amount of the loss that it had sustained through the defalcations of McCoy. The surety company voluntarily paid this sum as McCoy's bondsman. The Government has received $3,000 and instead of applying it upon the $15,129.81 it applied it on a fictitious claim made by it against McCoy, contrary to the provisions of the bond.

This $3,000 was collected by the Government before the suit was instituted and before a demand was made upon the bank for the amount prayed for in the claim; so at the time this suit was instituted the Government's legitimate and honest claim

against the bank could not possibly have exceeded $12,129.81. The fact that this payment by the surety company of $3,000 we think the record clearly shows was concealed from the defendant by the Government officials. Nowhere in the record or in the evidence is any reference made to the payment of this sum by the surety company. It is unconscionable and unjust to permit a plaintiff to recover $3,000 more than its just, legitimate claim. The Government says in this case that it lost $15,129.81 through the defalcations of McCoy. As a matter of fact it must be apparent to any fair minded man that the Government upon its own showing has not sustained such a loss by the sum of $3,000. Fair dealing and good conscience ought to have induced the Government to give to the defendant bank credit for this sum. It did not do so. The defendant knew nothing of it until too late to produce the same at the trial; but it did so with commendable industry and celerity after the discovery of the fact, and the Court should have granted a new trial upon this ground, if for no other.

We cannot believe that this Court will sanction any such practice upon the part of the Government. There is no possible dispute as to the facts; they

stand admitted by the affidavits and the evidence in support of the motion for a new trial. Will this or any other court allow such an unprecedented outrage to be perpetrated upon the rights of the defendant bank?

We think this evidence is clearly admissible under the issues as made up, but this is immaterial. Whether admissible under the present issues or otherwise, the pleadings can be reconstructed so as to make it admissible. It is a just defense to the claim of the plaintiff and the defendant ought not to be held guilty of any laches in failing to produce that evidence which it had no reason to know existed.

We earnestly contend that the Court erred in refusing to grant the motion for a new trial upon this ground.

Defendant's Exhibit No. 1, which has been sent up as one of the original exhibits in this case contains a transcript of the various statements furnished by the defendant at monthly intervals during the period of time the checks described in the complaint were issued by McCoy and paid by the defendant bank, and further show the condition of the account of McCoy, and the witness

Walker offered to testify as to the course of dealings between the bank and the plaintiff relating to the transactions involved in the issuance and payment of the checks, showing that the bank rendered monthly statements to the Government during the entire period of three years when these defalcations occurred, and that they were all approved by the Government and no complaint or protest made by the Government, all of which tended to show a ratification on the part of the Government of the acts of McCoy in drawing the checks and in the act of the bank in paying such checks. It was for the jury to determine whether or not these acts amounted to a ratification of the action of McCoy in drawing the checks and the action of the bank in paying them. It was not for the Court to say that such acts were insufficient to amount to a ratification. Moreover, the exhibits introduced by the Government show affirmatively that all of the accounts of McCoy and the receipts for the payment of this money to various and sundry parties were ratified by the Commissioner of the Land Office.

All of these circumstances were evidence for the jury to consider in reaching a determination as

to whether or not there was a ratification of McCoy's acts.

For the foregoing reasons we confidently insist that the lower Court committed errors which necessitate the reversal of the judgment entered herein, and the granting of a new trial.

Respectfully submitted,

J. A. KERR,

EVAN S. McCORD,

Attorneys for Plaintiff in Error.